United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1124 (1)

Time Requested:

30 minutes

To be argued by:

Abraham Werfel, Esq.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES, ex rel. ALEJANDRO DANEFF,

Petitioner-Appellant,

No. 74-1124

- against -

ROBERT HENDERSON, Superintendant, Auburn Correctional Facility Auburn, New York,

Respondent

BRIEF FOR RELATOR-APPELLANT

&

APPENDIX

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UNITED STATES, ex rel. ALEJANDRO DANEFF,

Petitioner-Appellant,

- against -

No. 74-1124

ROBERT HENDLRSON, Superintendant,
Auburn Correctional Facility
Auburn, New York,

Respondent.

BRIEF FOR RELATOR-APPELLANT

DISPOSITION OF THE CASE BELOW

Relator appeals from an order of Hon. Inzer B. Wyatt, Judge, United States District Court for the Southern District of New York, dated October 9th, 1973, denying his petition for a writ of habeas corpus, without a hearing.

On behalf of ALEJANDRO DANEFF, a New York State prisoner confined to the Auburn Correctional Facility, his attorney, Abraham Werfel, Esq., submitted a petition for a writ of habeas corpus, dated May 9th, 1973. Upon denial of the writ, a notice of appeal and certificate of probable cause were duly filed.

This proceeding was instituted as a result of a judgment of conviction of the Supreme Court of the State of New York, Criminal Term, Bronx County, rendered on the 18th day of December 1970, by Hon. Isidore Dollinger, Justice, on a plea of guilty to the

crime of Criminal Possession of a Dangerous Drug in the Second Degree, a Class B Felony, whereby he was sentenced to imprisonment for a maximum of ten years.

Petitioner's judgment of conviction inthe State court was unanimously affirmed without opinion by both the Appellate Division of the Supreme Court, First Department (37 AD 2d 917) and by the Court of Appeals of the State of New York (30 NY 2d 793, remittitur amended 31 NY 2d 667). On January 22nd, 1973, the United States Supreme Court denied a petition for a writ of certiorari (410 U.S. 913).

Throughout all the Courts below, petitioner duly raised the federal constitutional questions considered herein.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Eighth and Fourteenth Amendments to the Constitution of the United States.

The sections of the New York Penal Law are:

> "Section 220.05 Criminal possession of a dangerous drug in the sixth degree- A person is guilty of criminal possession of a dangerous drug in the sixth degree when he knowingly and unlawfully possesses a dangerous drug.
> Criminal possession of a dangerous drug in the sixth degree is a Class A misdemeanor.
>
> Section 220.15 Criminal possession of a dangerous drug in the fourth degree- A person is guilty of criminal possession of a dangerous drug in the fourth degree when he knowingly and unlawfully possesses a narcotic drug:
>
> 1. With intent to sell the same; or
> 2. Consisting of (a) twenty-five or more cigaretts containing cannabis; or (b) one or more preparations

compounds, mixtures or substances of an aggregate weight of (i) one-eighth ounce or more, containing any of the respective alkaloids or salts of heroin morphine or cocaine, or (ii) one-quarter ounce or more, containing any cannabis, or (iii) one-half ounce or more, containing raw or prepared opium or (iv) one half ounce or more, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the fourth degree is a Class D felony.

Section 220.20 Criminal possession of a dangerous drug in the third degree- A person is guilty of criminal possession of a dangerous drug in the third degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigaretts containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or (ii) one or more ounces, containing any canabis, or (iii) two or more ounces, containing raw or prepared opium, or (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.

Criminal possession of a dangerous drug in the third degree is a Class C felony.

Section 220.22 Criminal possession of a dangerous drug in the second degree- A person is guilty of criminal possession of a dangerous drug in the second degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of eight ounces or more, containing any of the respective alkaloids, or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

Criminal possession of a dangerous drug in the second degree is a Class B felony.

Section 220.23 Criminal possession of a dangerous drug in the first degree- A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures, or substances of an aggregate weight of sixteen ounces or more containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

Criminal possession of a dangerous drug in the first degree is a Class A felony."

THE QUESTIONS PRESENTED

1. Since the unlawful possession of any quantity of a narcotic drug is decreed to be a misdemeanor under Section 220.05 of the New York Penal Law, are Sections 220.23 and related felony sections of the Penal Law under which petitioner was indicted, constitutionally invalid, in that the standard set forth to determine more severe criminal culpability and punishment is based upon the possession of a quantity of a "mixture" containing only a minute amount of narcotic, rather than the quantity of actual narcotic content?

2. Does the equal protection clause of the Fourteenth Amendment prohibit treating differently two persons, possessing the identical quantity of narcotics, one as a misdemeanor and the other as a felony subject up to a mandatory life sentence, solely because the latter possesses the identical quantity of narcotics mixed with up to 16 ounces of inert diluent?

3. By treating one possessing a misdemeanor quantity of narcotics as a felony subject to a possible mandatory sentence of life imprisonment rather than "equally" to a maximum one year sentence, and by basing the penalty upon the weight of inert innocuous and legal substances, do the felony statutes permit cruel and unusual punishment in violation of the Eighth Amendment? Furthermore where as at bar, the statute is uned to coerce a guilty plea to a reduced charge to avoid the mandatory life sentence, does the statute provide for cruel and unusual punishment?

STATEMENT OF FACTS

Petitioner had been apprehended on January 23rd, 1970, in possession of "two plastic bags of white powder, total weight one pound, two ounces, cocaine present in each." Petitioner was indicted under Indictment Number 498-70 for violation of Section 220.23 (renumbered 220.33, eff. April 24th, 1970) of the Penal Law (Criminal Possession of a Dangerous Drug in the First Degree), a class A felony.

Under date of April 20th, 1970 petitioner filed a demurrer to said indictment on the grounds that the felony narcotic possession statutes were unconstitutional in that they violated the Eighth and Fourteenth Amendments of the United States Constitution. After hearing oral argument, Mr. Justice Sidney A. Fine disallowed the demurrer.

Petitioner entered a plea of guilty to Criminal Possession of a Dangerous Drug in the Second Degree, a class B felony, and was sentenced by Mr. Justice Isidore Dollinger on December 18th, 1970, to imprisonment for a maximum term of ten years. Prior to judgment being rendered, defendant moved for an arrest of judgment on the same grounds as contained in the demurrer. Said motion was denied by Justice Dollinger.

SUMMARY OF ARGUMENT

The State Penal Law provided that the possession of any quantity of narcotic drug is a misdemeanor, punishable by maximum imprisonment of one year. Where the aggregate quantity of preparation exceeds one-eighth ounce, the criminal culpability is

increased to a felony with proportionate increase of punishment to a mandatory maximum of life. Therefore, Section 220.23 and related felony possessory narcotic statutes are constitutionally invalid, because the standard provided for felony culpability is based upon the aggregate quantity of the "mixture" or "preparation", rather than the quantity of actual narcotic content. A defendant possessing 16 ounces of cocaine preparation (class A felony) is treated more harshly under the statutes than another possessing a "mixture" weighing less than 16 ounces, although each are equally situated in that each may possess the same quantity of narcotic drug. This statutory scheme applies even if the quantity of narcotic drug is actually only disdemeanor weight. As the statute reads and is applied, it is violative of the due process and equal protection clauses of the Fourteenth Amendment.

Furthermore, providing for mandatory life imprisonment (class A felony) for the possession of 16 ounces of innocuous and legal substances, because there is the mere "presence" of an indeterminate and possibly minute quantity of narcotic, is cruel and unusual punishment violative of the Eighth Amendment.

POINT ONE

Section 220.23 and Related Felony Narcotic Possessory Sections of the Penal Law are, Violative of the Equal Protection Clause of the Fourteenth Amendment.

The basic New York State statute, pretaining to the possession of any quantity of narcotic drug, is Section 220.05, Criminal Possession of a dangerous drug in the Sixth Degree, which prohibits knowingly and unlawfully possessing a dangerous drug. Violation of this Section is a class A misdemeanor, punishable by maximum imprisonment of one year.

The indictment filed herein charged that the petitioner:

> "Knowingly and unlawfully possessed a narcotic drug consisting of a preparation, compound, mixture and substance of an aggregate weight of sixteen or more ounces containing the alkaloid and salts of cocaine."

The applicable statute, Section 220.23 of the Penal Law, states in part:

> "A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of sixteen ounces or more containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.
> "Criminal possession of a dangerous drug in the first degree is a class A felony". (Emphasis supplied).

We respectfully submit and urge that in distinguishing the class A felony and the less serious possessory felonies from the misdemeanor crime (Section 220.05)[1*] on the basis of the weight of

1* Less than 16 ounces but 8 ounces or more-class B felony-Section 220.22; less than 8 ounces but 1 ounce or more class C felony-Section 220.20; than 1 ounce but 1/8 ounce or more class D felony-Section 220.15; less that 1/8 ounce-misdemeanor- Section 220.05.

a "preparation, compound, mixtures or substances" of nonnarcotic content which also contains the "presence" of narcotic, the statute is constitutuinally defective, violating the Fourteenth Amendment of the United States Constitution. A person such as petitioner, possessing a certain quantity of narcotic is not treated equally with another who possesses the same amount of narcotic, just because the former happens to be comminged with a larger amount of inert and nonnarcotic substance.

The Federal question presented herein has not heretofore been decided by any Federal Court.

Our research has uncovered no Federal statute or law of any other State, where the degree of criminal responsibility for narcotic possession is based upon the aggregate weight of a mixture or compound.

In the case at bar, petitioner was indicted for the class A felony, and permitted to plead to the class B felony, on evidence that he possessed "two plastic bags of light (sic, should be white) powder, total weight one pound two ounces, cocaine present in each." It was stipulated that the People's evidence was linited to the fact that "cocaine was present in each bag" (sentence minutes pp. 4, 10).

It is, of course, common knowledge that narcotic found in the illicit market are not 100% pure narcotic. They are not even imported in pure form and are commonly mixed with milk sugar, quinine and other diluents by wholesalers in narcotic "mills", and by small pushers and even by the addicts themselves. Narcotics are found in the illegal market in varying strengths and prices

Turner v. United States, 396 U.S. 393)[2*]. Therefore, it does not require much imagination to pose every-day examples of the harsh and arbitrary applicability of these narcotic statutes which provide felony punishment if the possession exceeds 55 grains of mixture.

For example, an addict is about to prepare a "fix" of one grain of heroin mixture in a spoon or "cooker". If he is apprehended at this stage, he has committed misdemeanor possession. However, if prior to arrest he advanced to the stage where he has added slightly more than a teaspoon of water to make the injectable solution, he is in possession of more than 1/8 oz. of a heroin "preparation or "mixture", and is punishable as a class E felony[3*].

Another example, this same addict possesses 30 grains of a mixture for his own continuous use. This is misdemeanor weight. He finds it too strong and adds an equal amount of milk sugar. He is thereafter arrested in possession of this mixture, containing the exact same quantity of narcotic, but he now has felonious possession. If he had added 16 ounces of milk sugar he would have class A felony possession.

2* A kilogram of heroin, which is 80 to 90 % pure, is shipped into the United States. From this point, the heroin passes through many different levels of dealers. At each stage it is diluted with at least a one-to-one "cut" so that, although the aggregate weight of the kilogram remains unchanged, the actual concentration of heroin is decreased markedly. Ultimately it is sold on the street in glassine bags for $3 to $5 each. There may be as little as none or as much as 77% heroin. Of 200 bags of confiscated heroin examined by the Medical Examiner's Office of the City of New York, 30 were found to be completely free of heroin, containing substances varying from baking powder to cannabis (Stimmel, B. The Problem Drugs, Drug Abuse: Special Report on a National Epidemic, N.Y.L.J. December 6, 1971: p. 26 Col.2).

3* One avoirdupois ounce consists of 436 1/2 grains; 1/8 ounce is approximately 55 grains; one teaspoonful of liquid is approximately 1/8 fulid ounce (see definitions, Section 220.00).

An exaggerated example is submitted for reasons which will hereinafter become obvious. Suppose a person possesses 7 1/2 grains of pure heroin, and upon arrival of the police, he throws it into a pailful of garbage and it becomes a commingled "mixture". The query is posed; is he guilty of a class A felony because the "mixture" weighs 2 1/2 pounds, as contrasted to another equally situated possessing 7 1/2 grains, who is guilty only of a misdemenaor? Would it not be cruel and unusual punishment to subject this person to mandatory life sentence for possession of 2 1/2 pounds garbage, because it happens to contain the 7 1/2 grains of heroin?

In the New York Appellate Division court below, in commenting upon the exaggerated example of a pailful of garbage, the District Attorney contended:

> "That appellant failed to consider the primary command to the judiciary concerning the interpretation of statutes, to wit: to ascertain and effecutate the purpose of the Legislature (cases cited). In this instance, the purpose of the statute was not to prosecute possessors of garbage, but rather to inhibit the flow of narcotics to the addict in their final consumable form." (Emphasis added).

We assumed that the District Attorney was urging that appellant's argument was specious, because the statute would never be interpreted as written.[4*] Unfortunately, the reverse is true, for court record discloses that a learned member of the State judiciary has ruled otherwise. At a 1968 trial in Supreme Court, Queens County, in People v. Floyd (conviction reversed on other grounds in 26 N.Y. 2d. 558), the District Attorney contended, and Justice T. Vincent Quinn held, that a defendant would be guilty of a felony if he possessed 7 1/2 grains of heroin and threw it into

4* See footnote 5, infra

2 1/2 pounds of garbage.

With respect to the District Attorney's contention that the legislature's purpose in passing the statutes was "to inhabit the flow of narcotics to the addict", we must point out that this argument is inapposite to the issue at bar. For the purpose of this proceeding we are not concerned with statutes proscribing the transfer or sale of narcotics. Under New York statutory scheme the sale or transfer of narcotics falls under other sections of the Penal Law (see Sections 220.35, 220.40, 220.44 in effect in 1970; and 220.39, 220.41 and 220.43, effect. Sept. 1st, 1973). We also do not reach the more difficult issue as to whether greater punishment can be constitutionally imposed for the possession of larger quantities of pure narcotics for one's own use. We here decry only greater degreed degree of criminality for the single possession of larger quantities of inert and innous diluent substances which are found mixed with a small but indeterminate amount of narcotic substance.

But even in the former situation, (sale of narcotics), it would appear that the sole "reasonable ground and rational basis in fact" which could sustain the different punishments (Booth v. Illinois, 184 U.S. 425; Chicago, Burlington, etc., v. McGuire, 219 U.S. 549; People ex rel. Bryant v. Zimmerman, 278 U.S. 63) would be the "evil" of the sale or "flow" of narcotics, which might be presumed from the possession of extremely large quantities of narcotics. (Turner v. United States, 396 U.S. 393 fnt. 30, p. 416; supra).

But this rationale is invalid under the New York State scheme for at least two reasons.

Firstly, the state legislature, in revising the Penal Law,

deliberately eliminated the "presumption of sale" from the possession of larger quantities of narcotic (see former Section 1751 of the Penal Law). Instead, the Legislature specifically decreed that possession of any quantity of narcotic drug, "with intent to sell the same" is a violation of Section 220.15 criminal possession of a dangerous drug, in the fourth degree, a class D felony. Therefore, inferring an intent by the Legislature to distinguish the degrees of culpability for simple possession on this basis flies in the face of the expressed intent set forth in the statutes.

Secondly, felony possession under New York statutes does not necessarily involve "extremely large" or even "larger" quantities of narcotics, or that the possessor intends to sell same. Three of hundreds of examples are detailed here. In the Floyd case, supra, the defendant was convicted of a felony for possession of 74 grains of heroin mixture, only 19 grains in excess of 55 grains demarcation. There the prosecutor argued and proved to the jury that Floyd was an addict and possessed the narcotics for his own use. Nevertheless, the statute provided for and Floyd received felony punishment.

In the Supreme Court of the State of New York, Queens County (Index # 2773-72) an indictment charged the defendant, Wayne Demarest, with the possession of only 3 grains of marijuana compound or mixture, in excess of the 1/4 ounces demarcation for marijuana under Section 220.15. For the possession of this minute excess possession of an inert diluent such as grass or tobacco- the defendant faced a 7 year penalty as a felony rather than 1 year penalty as a misdemeanor.

Another example and one the courts are being deluged with, is the illegal possession of methadone by the addicts.[4*] Methadone is dispensed in either of two forms, in tablets the size of the popular asprin, each containing 40 milligram (2/3 of a grain) of methadone; or mixed in orange or grape juice (80 milligram) in a two ounce bottled mixture. A daily dose is normally 80 milligrams (either two tablets or a two ounce juice mixture. Query, is not the methadone juice mixture a "preparation containging narcotics in their final consumable form? Is the addict possessing two ounces of methadone mixture guilty of a class C felony, whereas another possessing the tablets is only guilty of a misdemeanor, because the latter possesses the same 1 1/2 grains of methadone in tablets weighing only ten grains?

Is this just another of petitioner's "purely speculative horror cases", as contended by respondent in the District Court? Horror, it is; but speculative, it is not. For example, in the Criminal Court, Queens County, Docket No. Q319729/73, an 18 year old Ellen Giles was arrested on September 14th, 1973 and charged with the possession of "two plastic bottles containing a quantity of methadone". She was charged with a violation of Section 220.09 of the Revised Penal Law, "possession of a preparation of an aggregate weight of one-eight ounce or more containing a narcotic drug", a class C felony.

We respectfully submit that the statutes are clear and unambiguous. The defendants in the foregoing examples would be

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4* Study Finds Black Market Developing in Methadone, by James M. Markham, New York Time, January 2nd, 1972, p. 1

subject to the felony statutes[5*], just as petitioner Daneff was subject to the class A felony statute because he possessed more than 16 ounces of a "white powder". The only evidence to sustain the indictment was that an indeterminate amount of cocaine was present in the mixture. If in fact the white powder contained as much as three-quarters of one percent of cocaine, the narcotic content of the mixture would be only 54 grains of cocaine. Another possessing 54 grains of pure cocaine would only be subject to misdemeanor penalty.

In the State court below, respondent argued that 18 oz. of powder containing 54 grains of pure cocaine could be the equivalent of 7920 doses which is far more than an addict would have for his own use and therefore indicates that it was possessed by a "wholesaler" in narcotics. Does it not then stand to reason that the possessor of 54 grains of pure cocaine is also a narcotic "wholesaler". Does it not violate the equal protection clause by treating the former

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5* It is not sufficient to answer these examples by contending that the are unsupported by "any citations to cases in which an accused has beer convicted for the felonious possession of such compounds" (Respondent's Brief in Opposition to Petition for Writ of Certiorari (Emphasis added) "Our law does not contemplate that freedom from arrest and criminal prosecution shall depend upon the practical judgment or generous attitude of policemen, whether lawful or unlawful; and their duty would not be met by winking at the Penal Law. Such is not the test of constitutic ality. Whether the Legislature has exercised its power arbitraily and unduly infringed the rights of citizens, is not to be determined by the possibility of its considerate enforcement, but rather by what may be done under it. (Bailey v. Alabama, 219 US 219, 239...)" People ex rel. Dixon v. Lewis, 249 App. Div. 464, 467. New York State courts are constrained to follow the language in a statute when it is clear and unambiguous. They cannot correct supposed errors, omissions or defects in Legislation. See Helter v. Koenigsberg, 302 N.Y. 523, 525.

"wholesaler" as a class A felony whereas the latter "wholesaler" is treated only as a misdemeanor? Is it not even more horrendous when we recognize that the misdemeanant is the major violator, and probably the actual importer? (See footnote 1 and 2, supra).

It is obvious, therefore, that in determining whether these felony statutes are constitutional, we may not assume that we are concerned with "large quantities" of narcotics, involving narcotic dealers.

Thirdly and most importantly, the fallacy must be exposed that larger quantities of "marketable compound"; without concern for the percentage of narcotic contained therein, has a relationship to the degree of use or traffic in narcotics. It is based upon an apparent misconception that narcotics are different from other drugs. Narcotics, just as any other medication, are utilized in measured doses according to its strength. The dose of a more potent or higher percentage compound, is correspondingly smaller than that of a weaker mixture. Accordingly, possessing a larger quantity of narcotic preparation in a weaker concentration does not result in more doses available for use, unless the addict is unaware of the true concentration of his immediate supply.[6*]

Moreover, even if we do concern ourselves with well intentioned severe punishment to narcotic dealers, the operation of the state

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6* This explains the serious problem of overdose. "The marked variability in heroin concentration makes it apparent that any given number of bags injected regularly may at any one time easily contain a lethal concentration of heroin". (Stimmel, B. The Problem Drugs, Drug abuse; Special Report on a National Epidemic, N.Y.L.J. December 6, 1971, p.26 Col. 5.

felony statutes leads to an opposit result. If after importation, the heroin (applies likewise to cocaine) passes through different levels of dealers "and at each stage it is diluted with at least a one-to-one cut"[7*], the first and major violator is subjected to the least penalty, whereas the final and smallest dealer is subject to the heavisest penalty, since misdemeanor quantity of 90% pure will be cut in 3 stages to 16 ounces of 1% pure[8*].

Accordingly, contrary to the holding of the District court there is no rational basis to the classification under the statutes, and the statutes herein must be found constitutionally defective as violating due process and equal protection of the law.

The fact that one can give an argument which may have some rationality is not sufficient to hold these statutes as written constitutional. The Fourteenth Amendment, with respect to the administration of justice, requires that no different degree or greater punishment shall be imposed on one that on all others for the same offense (Moore v. Missouri, 159 U.S. 673; Hodgson v. Vermont, 168 U.S. 262). Giving a rational reason behind the states actions did not prevent the United States Supreme Court from holding actions

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7* See footnote 2.

8* Major violator possesses 90% pure-under 1/8 oz. misdemeanor
Second stage possesses 45% pure 1/4 oz. D felony
Third state possesses about 23% pure- 1/2 oz. D felony
Fourth stage possesses about 12$ pure- 1 oz. C felony
Fifth stage possesses about 6% pure 2 oz. C felony
Sixth stage possesses about 3% pure- 4 oz. C felony
Seventh stage possesses about 2% pure- 8 oz. B felony
Eighth stage possesses about 1% pure- 16 oz. A felony

unconstitutional in Griffin v. Illinois, 351 U.S. 12, see Justices Burton and Minton's dissents at 27 (record on appeal for indigents); in Douglas v. California, 372 U.S. 353, see Justice Harlan's dissent at 361 (counsel on appeal), in Carrington v. Rash, 380 U.S. 89, see Justice Harlan's dissent at 99 (voting by servicemen), and in Harper v. Virginia, 383 U.S., See Justice Black's dissent at 673 (poll tax). The new laws now also proscribe the possession of hallucinogens, also called "soft drugs"; however, these are treated according to weight of the prohibited substance. Some explanation is set forth in McKinney's Concolidated Laws of New York, under the Supplementary practice Commentary by Arnold Hechtman (Section 220.00):

> "Examining the quantification scheme as a whole reveals that two weight standards are now used instead of the previous one; to the aggregate weight standard heretofor exclusively employed has been added one that depends solely on the weight of the prohibited substance (see e.g. Sec. 220.09). Those so treated are the 'soft' drugs... the fact that they are commercially manufactured and distributed in tablets, capsule or spansule form, rather than in bulk, undoubtedly dictates the weight of-the-substance standard rather than the aggregate weight one."

The fact that hallucinogens are commerically manufactured in tablet, capsule or spansule form is truly a valid reason why culpability should be measured by the weight of the prohibited substance. It is a recognizion that the tablet, capsule or spansule form dictates the use of an innocuous diluent which is added to the active ingredient when it is marketed. But so is methadone, so is cocaine, and so is heroin. The fact that it is marketed in bulk, which means only that it is in a powder form, does not truly distinguish the two types of products, when it is conceded that hard drugs are always found in diluted form.

It should be noted that the commentators have not overlooked this latest expression by the Legislature. In a series of articles in the New York Law Journal, commencing August 31, 1973, by Albert M. Rosenblatt, entitled "Understanding the New Drug, Sentencing Laws" it is noted that under the statutory scheme "a person could possess far less of the illicit substance in a larger amount of the aggregate weight, and yet be charged with a higher crime than one who had less (pure) weight." The article notes, however, that the New York Court of Appeals has found no constitutional objection, citing People v. Daneff.

Turning to the District Court's decision, the following is the basis of the denial of the writ (A):

> "Since narcotics are thus sold and used in a diluted form, it seems reasonable for the legislature to distinguish on the basis of the weight of the market product rather than the weight of the narcotic content of the market product. The quantity of the market product seems a reliable guide to whether a defendant is a larger scale or small scale dealer".

For all the reasons set forth above, and with emphasis on the fact that the felony possessory statutes are separate and apart from the State statutes proscribing the sale of narcotics, it is respectfully submitted that the Court's reasoning cannot be sustained.

It should be noted that Daneff was not charged with the sale of narcotics, nor was there any evidence that he was a dealer in narcotics[*9]. But even if the possession of 18 oz. of "white powder containing the presence of cocaine" were a reliable guide that he was a dealer, it does not satisfy the equal protection clause. For,

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9* In the court below, respondent notes that $5000 in cash was found on the possession of Daneff upon his arrest. Ignored, however, is the fact that the money was ordered by the trial court returned to Daneff on the statement by the prosecutor that there was no evidence that the money was the proceeds or instruments of any crime.

another possessing the same amount of pure cocaine (54 grains), and therefore being the same dealer, is still treated as a misdemeanor.

It should be noted that, although all of the New York narcotic laws herein considered were repealed, effective September 1, 1973, as indicated by the district court, other narcotic laws took their place. All the laws considered herein were replaced with statutes containing the same deficiency as before- distinction between misdemeanor and all grades of felonies is based upon the aggregate weight of the mixture (see Sections 220.09, 220.18, 220.21 of the Revised Penal Law).

Furthermore, the district court points out that the equal protection clause does not require "mathematical certainty" of equality if there is a rational basis. We respectfully submit that we have demonstrated mathematical certainity of inequality in each and every prosecution under the felony statutes which permit degree of culpability to be based upon aggregate weight.

The district court also commented upon, without deciding, whether petitioner has standing to raise his claim, because Daneff did not prove what percentage of pure cocaine was in the 18 ounces of white powder. The court questioned whether the stipulation in the trial court that the prosecutor had no evidence other than that "cocaine was present" was sufficient. Since the revision of the Penal Law, effective September 1, 1967, there has been no need for the prosecution to make a quantitaive analysis of narcotic evidence seized (See McKinney's Consolidated Laws of New York, annotated, under the Practice Commentary by Richard G. Denzer and Peter McQuillan (Section 220.15). The district court therefore implies that the petitioner should have assumed the burden of proving evidence of his guilt. Putting aside the

fact that petitioner would have no opportunity of conducting the required chemical tests, the shifting of the burden to prove guilt from the prosecution would involve constitutional infirmity (In Re Winship, 397 U.S. 358, 364, also Black, J. dissenting at 386; Speiser v. Randall, 357 U.S. 513, 525-526; cf. Morrison v. California, 291 U.S. 82).

POINT TWO

Section 220.23 of the State Penal Law and related felony statutes provide for cruel and unusual punishment.

A mandated life sentence for the possession of a sixteen ounces or more of a "white powder containing only the presence of cocaine" as decreed in Section 220.23, is cruel and unusual punishment under the guidelines enuciated so recently by the United States Supreme Court in Furman v. Georgia, 408 US 281; Such punishment by its severity is degrading to human dignity; it is inflicted in a wholly arbitrary fashion; it is clearly and totally rejected throughout society since noother jurisdiction proscribes such severe penalty for the simple possession of narcotics; and such severe punishment is patently unnecessary.

Since the enactment of this statute in 1969, the mandatory life imprisonment sentence had been meted out in numbers less than can be counted by the fingers of the hand. A conviction under this statute had resulted only when the defendant has refused to waive his rights to trial and refused to plead guilty to a lower crime. In the case of petitioner at bar, he was foreclosed from even exercising

his right to a pre-trial motion to suppress the evidence seized, because of the open and avowed threat by the prosecutor that, if petitioner were unsuccessful in his motion, he would not be permitted to plead to a lower degree of crime. Accordingly petitioner waived his constitutional rights to a hearing to controvert a search warrant, to suppress the evidence seized, and of course, to proceed to trial. Even though petitioner was a person without prior criminal record, and in fact a business man of excellent repute, unless he entered a guilty plea to a reduced charge, the sentencing judge would have had no discretion and would have been forced to sentence petitioner to life imprisonment, upon conviction. This statute was designed, and in preactice has been used, solely to encourage or even coerce a guilty plea to a reduced charge, and as such constitutes cruel and unusual punishment (United States v. Jackson, 390 U.S. 570).

Furthermore, providing for severe punishment for Classes A,B, C and D felonies, as contrasted to the misdemeanor, for the possession of an inert diluent, be it milk sugar, orange juice, or syrup, is cruel and unusual punishment. Where the statute permits, and the State actually does, treat one possessing a misdemeanor quantity of pure narcotic as a felony subject to life imprisonment, rather than "equally" to one year maximum sentence, we submit, that person is subject to cruel and unusual punishment. This is especially so when the accused is charged with possessing a product which the State cannot prove contains more than the "presence" of narcotic. (See Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 340).

We do not contend that the sentence meted out to Daneff (10 years imprisonment as contrasted to the maximum allowable by statute) is cruel and unusual punishment per se. If the statute permitting life imprisonment or the 25 year maximum is constitutional, then a sentence of 10 years is abviously not cruel and unusual punishment as well within the limits of the statute and not an abuse of discretion. It is our contention that Daneff was subject to life imprisonment under the indictment, to 25 years maximum under his plea, and did receive a sentence of 10 years for the possession of inert and innocuous substances, with no evidence to sustain that there was more than the "presence" of narcotic. To make such punishment dependent upon the weight of such lawful substances, is cruel and unusual punishment.

CONCLUSION

The State felony possessory statutes should be ruled invalid. The State Legislature is not without adequate remedy. The classifications can be based upon quantities of narcotic content, just as the Legislature has now provided with respect to hallucinogens. As an alternative possession of any effective quantity can be made subject to a fixed felony punishment, with no specified minimum, leaving it to the discretion of the Court to impose a lower sentence under the circumstances of the case.

THE PETITION FOR WRIT OF HABEAS CORPUS SHOULD BE GRANTED

Respectfully submitted,

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This is an application for the writ of habeas corpus (28 U.S.C. § 2241) by Alejandro Daneff, represented by counsel but permitted (by order filed May 3, 1973) to proceed in forma pauperis (28 U.S.C. § 1915(a)).

Daneff is in custody at Auburn Correctional Facility in Cayuga County under a judgment and sentence entered and imposed on December 18, 1970, in the New York Supreme Court, Bronx County. The application may thus be properly made to this Court (28 U.S.C. § 2241(d)).

Daneff was indicted on February 9, 1970 in the Bronx County Supreme Court for violation of then Section 220.33 of the Penal Law (criminal possession of a dangerous drug in the first degree, a Class A felony). That section was renumbered, effective April 24, 1970, and became Section 220.23.

(It may be noted that effective September 1, 1973, all of the New York narcotics laws herein considered were repealed and other narcotics laws took their place. Laws of New York 1973 chapters 276, 1051)

Daneff, apparently represented throughout by counsel, filed a demurrer to the indictment, claiming - as he now claims here - that Section 220.23 and related New York felony narcotics laws are unconstitutional, this because the distinction between the grades of felonies (Class A, Class B, etc.) and hence the difference in permissible punishment are based upon the weight of the mixture possessed rather than the weight of the actual narcotic content of the mixture.

This argument was rejected in the New York Supreme Court and the demurrer was disallowed on April 29, 1970.

On September 22, 1970, Daneff pleaded guilty to a violation of Section 220.22 of the Penal Law (criminal possession of a dangerous drug in the second degree, a Class B felony).

Before accepting the guilty plea, the Court advised Daneff that he would be treated as a Class C felony offender

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and that a term of up to ten years would be imposed. How this squares with the New York statutes is not clear, but no point is made by either side as to this.

On December 18, 1970, sentence of imprisonment for up to ten years was imposed in Bronx County Supreme Court. A motion in arrest of judgment, based on the constitutional claim, was made and denied at this time.

The constitutional claim was pressed on appeal. The judgment of conviction was affirmed without opinion by the Appellate Division on October 28, 1971 (37 A.D.2d 917, 325 N.Y.S. 902 (1st Dept.)).

Leave to appeal was granted by Chief Judge Fuld.

On June 1, 1972, the Court of Appeals affirmed the conviction without opinion (30 N.Y.2d 793, 334 N.Y.S. 897).

On September 28, 1972, the Court of Appeals granted a motion on behalf of Daneff to amend the remittur to show that on appeal a federal constitutional question was decided, namely, whether Penal Law §§ 220.22 and 220.23 and related statutes are constitutionally invalid as violative of the equal protection clause of the Fourteenth Amendment (31 N.Y.2d 667, 336 N.Y.S.2d 903).

On January 22, 1973, the United States Supreme Court denied a petition for a writ of certiorari (410 U.S. 913).

That Daneff pleaded guilty in the state court does not bar his application here. In many cases, such a plea does act as a bar but this on a theory of voluntary waiver and where Daneff was urging his claim at every point in the state court, he could not be said to have waived it. See United States ex rel. Rogers v. Warden of Attica State Prison, 381 F.2d 209, 212-213 (2d Cir. 1967).

Daneff has clearly exhausted his remedies in the state courts (28 U.S.C. § 2254(b)).

The substance of the claim by Daneff is that the equal protection clause of the Fourteenth Amendment is violated by a statutory scheme which classifies the degree of criminality (and therefore punishment) upon possession of different quantities of a narcotic mixture rather than upon the quantities of actual narcotics present in the mixture.

The relevant New York statutes provide that anyone who possesses a narcotic mixture of an aggregate weight of

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eight ounces or more is guilty of a class B felony, while one who possesses such a mixture of an aggregate weight of sixteen ounces or more would be guilty of a Class A felony.

Daneff was indicted for possessing a narcotic mixture weighing eighteen ounces and containing cocaine. He argues that no tests were performed to determine the amount of pure cocaine in the mixture but that he was subject to a greater potential sentence than those who had narcotic mixtures of less aggregate weight but with equal, or even greater, quantities of pure narcotics in their mixtures.

There is grave doubt that Daneff has any standing to raise such a claim because, as applied to his case, it is entirely speculative and without any evidence in the record.

In connection with his demurrer in the state court and with the later proceedings, Daneff made no attempt to show what per centage of pure cocaine was in the one pound two ounces of "light [white] powder" in his possession; his brief to the New York Court of Appeals (p. 3) quotes the sentence minutes: "cocaine present". In the same brief (p.8), it is said that it was stipulated in the trial court that there were two plastic bags of white powder and that "cocaine was present in each".

For all that appears, therefore, the mixture Daneff had could have been 95% cocaine, or 1%. Nor does he show what per centage of cocaine was present in the mixture possessed by any other person charged with violation of New York narcotics laws. As applied to Daneff, these laws may in fact have favored him over others. The situation is entirely hypothetical and speculative as to him.

We will deal with the claim on its merits, however, whatever may be the standing of this applicant.

The argument for Daneff has a superficial appearance of logic, but does not have sufficient substance to show the statutes unconstitutional under the equal protection clause.

The basic inquiry under the equal protection clause is "whether the challenged distinction rationally furthers some legitimate, articulated state purpose". McGinnis v. Royster, 410 U.S. 263, 270 (1973)

In instances where the activity sought to be regulated by the state involves the exercise of a fundamental constitutional right, it is required that the statutory classification be necessary to the achievement of a compelling state interest. See Eisentadt v. Baird, 405 U.S. 438, 447 (n7) (1972); Dunn v.

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Blumstein, 405 U.S. 330, 336 (1972) (voting rights). This strict approach is also employed when the classification used by the statute is suspect. Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (distinction between aliens and citizens).

There is no fundamental right to possess narcotics and the regulation of the possession and sale of narcotic mixtures is a vital police function. Classifications employed by state statutes should be upheld if reasonably related to the legitimate objective of the control of the distribution and use of narcotics. The classification of criminality employed by the New York statutes here is not subject to the strict standards first noted, since the regulation of narcotics does not impinge any fundamental right of Daneff and the classification used in the statute is clearly not of the suspect variety.

The legislative history indicates that the statutory framework of the New York statutes was designed to create a distinction in penalties between large scale traffickers in narcotics and small scale sellers, often themselves addicted to narcotics. See New York State Legislative Annual, 1969, page 560

There does not seem to be any statement by the legislature as to why the weight of the mixture was made determinative rather than that of the narcotic drug itself.

The explanation is undoubtedly that narcotic drugs are never sold - or even imported - as such, that is, in a pure form. They are sold after being diluted with milk sugar, quinine, mannitol, and other diluents. They are found in the illegal market in varying strengths and prices. So much is conceded for Daneff (Brief to New York Court of Appeals, p.9).

Since narcotics are thus sold and used in a diluted form, it seems reasonable for the legislature to distinguish on the basis of weight of the market product rather than weight of the narcotic content of the market product. The quantity of the market product possessed seems a reliable guide to whether a defendant is a large scale or small scale seller.

Assuming that there may be unusual circumstances in which the classification of criminality on aggregate weight of narcotic mixtures may result in some disparate treatment of similar offenders, such inequality would not be sufficient to invalidate the statutes. The equal protection clause does not demand mathematical certainty and equality within the classifications provided by the statutes. As was pointed out in United States v. Branigan, 299 F.Supp. 225, 233 (S.D.N.Y. 1969; Weinfeld, J.):

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". . . to recognize that a legislative provision has its shortcomings and in practice results in some inequality does not stamp it as unconstitutional absent a showing that it is without any rational basis and therefore arbitrary."

The claim that Daneff is subjected to cruel and unusual punishment in violation of the Eighth Amendment is without any merit. Daneff pleaded guilty to a Class B felony and was subject to a maximum term of 25 years imprisonment. Penal Law Section 70.00(2)(b). An indeterminate sentence of up to a maximum of ten years was imposed. The sentence given was well within the limits of the statute and did not constitute an abuse of discretion on the part of the sentencing judge. United States v. Dawson, 400 F.2d 194, 200 (2d Cir. 1968)

The application is in all respects denied.

SO ORDERED.

Dated: October 9,1973

Inzer B. Wyatt

INZER B. WYATT
United States District Judge

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DOCKET ENTRIES

PROCEEDINGS	Date Judgment
Filed petition for Writ of Habeas Corpus.	
Filed petitioner's order to show cause for a writ of habeas corpus, Ret. May 18, 1973 at 2:30 pm in room 36. Wyatt,J.	
Filed order permitting the pltff to proceed in forma pauperis without prepayment of fees. Ryan, J.	
Filed Affidavit by Abraham Werfel in reply to respondent's affidavit in opposition.	
Filed memo endorsed on motion filed 5-9-73--Application denied--Wyatt, J. mailed notice.	
Filed affdvt of D.R.Spiegel in opposition to application for a writ.	
Filed pet'n notice of appeal from order dated 10-9-73 dismissing action. Mailed copy to Atty Gen'l State of New York.	
Filed Notice of Motion to Appeal In forma Pauperis by the petitioner.	
Memo. endorsed-Wyatt J. dtd:Nov. 19-73, granting applicant in forma pauperis status in U.B.C.A. Certificate of probable cause is hereby made.	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [illegible]
Deputy Clerk